Re Samuel Pakianathan a/l Jabamanickam, ex p Perwira Habib Bank (M) Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY MATTER NO D3-29-335 OF 1990
KAMALANATHAN RATNAM JC
18 APRIL 1996

Civil Procedure *— Res judicata — Matter directed on appeal to be heard on the merits — Parties and privies cannot relitigate same issue — Whether issues raised by parties were on the merits — Meaning of 'on the merits'*

Bankruptcy *— Practice and procedure — Service of notice of bankruptcy or creditor's petition — Who can effect service — Whether 'a person in their employment' in r 109 of the Bankruptcy Rules 1969 can be interpreted to mean a person only in the permanent employment of a creditor or his solicitors — Whether the word 'employment' must be given a wider interpretation whereby employment can be by way of contract of service or even contract for service — Bankruptcy Rules 1969 r 109*

Bankruptcy *— Notice — Service of — Sealing — Service of a true copy instead of a sealed copy — Whether service bad — Whether effective service — Whether formal defect in bankruptcy notice and creditor's petition can be cured if debtor is not misled — Bankruptcy Act 1967 s 131*

Bankruptcy *— Petition — Service of copy of creditor's petition on judgment debtor — Judgment debtor not served sealed copy of creditor's petition — Whether effective service — Whether formal defect in bankruptcy notice and creditor's petition can be cured if debtor is not misled — Bankruptcy Act 1967 s 131*

Bankruptcy *— Petition — Authority to present petition — Petition presented by officers of company — Whether officer must be duly authorized under the seal of the corporation — Meaning of 'officer' — Bankruptcy Act 1967 ss 133 & 148 — Bankruptcy Rules 1969 r 215*

Bankruptcy *— Petition — Attestation of petition — Insufficient attestation — Whether identity of solicitor attesting could be ascertained*

Bankruptcy *— Petition — Place of filing — Whether to be filed in place where the debtor resides — Practice Direction No 3 of 1993 — Whether court has jurisdiction to deal with petition*

Words and Phrases *— 'On the merits'*

The judgment creditor ('the bank') obtained judgment against the judgment debtor ('the appellant'). The bank then took out a request for issue of a bankruptcy notice and filed a creditor's petition. The appellant filed an application to set aside the creditor's petition and, on 11 September 1990, the High Court dismissed the creditor's petition. However, the bank appealed to the (then) Supreme Court and the appeal was allowed, where the Supreme Court ordered the petition to be restored and be heard on its merits.

The appellant filed another application for an order to set aside the creditor's petition. On 28 February 1994, the solicitors for the appellant filed a summons in chambers for setting aside the service of the bankruptcy notice and creditor's petition. The former application was purportedly dismissed by the senior assistant registrar ('the SAR') and the appellant appealed against this dismissal. The latter summons was also dismissed. On 22 April 1994, the SAR made a receiving order and adjudication order. The appellant filed an appeal in respect of the order granted by the SAR.

Counsel for the bank raised a preliminary objection that the matter was res judicata. The bank argued that since the High Court had already heard the creditor's petition on 11 September 1990 and dismissed the same and upon appeal to the (then) Supreme Court, the appeal then being allowed, and since the issue regarding the bankruptcy notice and the creditor's petition had all been raised at both forums and fully canvassed, then, if any issue was not raised there, it was too late in the day to do so herein as the principle of res judicata would apply to bind even issue not raised therein.

It was argued that the service of the bankruptcy notice and the creditor's petition was bad as service was not by way of a sealed copy of the documents, and the process server had no authority to effect service. The appellant also argued that service had not been proven as the respondent had failed to annex sealed copies of the bankruptcy notice and creditor's petition to the affidavits of service. Further, it was alleged that the officer who attested the creditor's petition on behalf of the petitioning creditor was not authorized under the seal of the company. These issues were never argued before the High Court nor were they argued before the Supreme Court. The appellant also submitted that there was insufficient attestation as the identity of the solicitor who attested the petition was not stated. It was also contended that since the appellant had carried on business in Ipoh in the state of Perak and resided thereat and did not even carry on business nor reside in Kuala Lumpur, the petition ought to have been filed in Ipoh, Perak.

Held, allowing the appeal:

(1) When a matter between two parties had been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the res judicata. However, in this case, the petition was restored and directed to be heard on its merits.

'On the merits' means that the court has held that it had jurisdiction to adjudicate on an issue raised in the cause of action to which the particular set of facts give rise, and that its judgment on that cause of action is one that cannot be varied, reopened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction.

Therefore, in this case, the appellant must be allowed to raise all issues to oppose the creditor's petition whether or not raised earlier in these proceedings so that all issues may be 'fought to a final conclusion'. Issues which both parties wanted to raise would be 'on the merits' (see pp 748C–E, 749E, I and 750A); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 followed.

(2) So long as service is effected by a person employed by a firm of solicitors and so long as the affidavit of service filed shows that the said affidavit is filed through that firm of solicitors, it is immaterial if the said person employed is in the permanent or temporary employment or indeed employed on ad hoc commission basis to effect service of the process on behalf of the solicitors for the petitioning creditor. The words 'a person in their employment' in r 109 of the Bankruptcy Rules 1969 ('the Rules') cannot be interpreted to mean a person only in the permanent employment of a creditor or his solicitors. The word 'employment' must be given a wider interpretation for the purposes of interpreting r 109 of the Rules whereby employment can be by way of contract of service or even contract for service. Service in this case was proper service and was well within the meaning and intent of r 109 of the Rules and it would follow therefore that the creditor's petition and bankruptcy notice were properly served (see p 751A–B, F–I); *Dora bte Hj Adenan v Delta Finance Bhd* [1995] 3 AMR 2782 not followed and *Re Blackman, ex p Branfill* (1892) 40 WR 670 followed.

(3) Since the object of the bankruptcy notice was to bring to the attention of the appellant that the bankruptcy notice had indeed been issued against him, notwithstanding the fact that a true copy and not a sealed copy was served on the appellant, such service though strictly not in compliance with the Rules did not render the service bad. Therefore, there had been effective service of the bankruptcy notice (see p 754A–B); *Re Foo Hock Leng @ Foo Lew, ex p Southern Finance Co Bhd* [1994] 2 CLJ 658, *Au-Yong v Dicum & Anor* [1963] MLJ 349 and *Kamaruddin bin Mohamed v United Motor & Works (M) Sdn Bhd* [1982] 1 MLJ 126 followed; and *Re MPLM Muthiah Chettiar, ex p SPN Ramanathan Chettiar* [1938] MLJ 233 not followed.

(4) A formal defect in the bankruptcy notice could easily be cured by s 131 of the Bankruptcy Act 1967 ('the Act'). If the service of an unsealed creditor's petition could not reasonably have misled the appellant, it would be validated by s 131 of the Act. Therefore, the service of a true copy of the creditor's petition — though not a sealed copy of the petition — annexed to the affidavit of service was sufficient (see p 755C–H); *Kamaruddin bin Mohamed v United Motor Works (M) Sdn Bhd* [1982] 1 MLJ 126, *Rengasamy Pillai v Comptroller of Income Tax* [1970] 1 MLJ 233 and *Re Hj Yahya Lampang, ex p Sabah Development Bank Bhd* [1987] 2 MLJ 488 followed.

(5) In the case of a company presenting a petition by an officer authorized in that behalf, it is unnecessary that the resolution of the board to delegate its authority should be under seal, provided that the seal of the company is affixed to the authority. So long as a person is authorized under seal of the company to act under s 148, he therefore becomes an 'officer' under the Act. Likewise, in s 133 of the Act, an 'officer' duly authorized must be one who had been authorized 'under the seal of the corporation'. Where the authority from the corporation was given to the 'officer' under seal, proof of such authority must be furnished when challenged. The interpretation given to r 215 by the bank was wrong as all that the rule states is that petition may be presented by a corporation in its own name or in the name of the officer. In both instances, the officer must be duly authorized under seal and s 133 would override any ambiguity that may have arisen under r 215.

The deponents to the affidavit were clearly not authorized under seal as admitted by them. Therefore, the appellant's submission on this point was upheld (see pp 757I, 758A–D and 759B); *Re Midgley* [1913] 108 LT 45, *Re Tomkins & Co* [1901] 1 KB 476, *Re Sanders, ex p Sanders* [1894] 1 Mans 382 and *Re A Debtor (No 28 of 1917), ex p The Petitioning Creditors v The Debtor* [1917] KB 808 followed.

(6) Insufficient attestation was not a defect since the name of the firm was properly identified. If the need arose, the identity of the solicitor attesting could easily be ascertained (see pp 759I and 760A).

(7) Pursuant to Practice Direction No 3 of 1993, all petitions are to be filed in the state in which the appellant resides and that in the case of a petition filed before the coming into effect of the practice direction, the petitioner ought to apply in writing to transfer the petition to the court of the state where the debtor resides. This was not done in this case. However, notwithstanding this, the court has jurisdiction to deal with the petition (see p 760F–G).

Obiter:

Had the respondent produced any form of authorization given to the officers under seal even if such authorization was given long ago, the court would then have been inclined to follow the decision of McCardie J in *Re A Debtor (No 28 of 1917), ex p The Petitioning Creditors v The Debtor* [1917] KB 808 where it was held that a corporation may grant an authority to an officer to present a petition in the future in respect of acts of bankruptcy which may not have arisen at the date when the authority was given (see p 759B–E).

A **[Bahasa Malaysia summary**

Si piutang penghakiman ('bank tersebut') telah memperolehi penghakiman terhadap penghutang penghakiman ('perayu'). Bank tersebut memohon supaya notis kebankrapan dikeluarkan dan memfailkan suatu petisyen si piutang. Perayu memfailkan suatu
B permohonan untuk mengetepikan petisyen si piutang dan pada 11 September 1990, Mahkamah Tinggi menolak petisyen si piutang. Namun demikian, bank tersebut merayu kepada Mahkamah Agung (pada masa itu) dan rayuan dibenarkan, di mana Mahkamah Agung memerintahkan supaya petisyen dikekalkan dan didengar atas meritnya.

C Perayu memfailkan suatu permohonan untuk perintah mengetepikan petisyen si piutang. Pada 28 Februari 1994, peguamcara perayu memfailkan suatu saman dalam kamar untuk mengetepikan penyampaian notis kebankrapan dan petisyen si piutang. Permohonan yang pertama ditolak oleh penolong kanan pendaftar ('PKP') dan perayu merayu terhadap penolakan ini. Saman yang kemudiannya
D juga telah ditolak. Pada 22 April 1994, PKP membuat perintah penerimaan dan penghukuman. Perayu memfailkan rayuan berkenaan dengan perintah yang diberikan oleh PKP.

Peguam bank tersebut membangkitkan suatu bantahan permulaan bahawa perkara itu adalah res judicata. Bank tersebut menghujahkan
E bahawa memandangkan Mahkamah Tinggi telah mendengar petisyen si piutang pada 11 September 1990 dan menolak yang sama dan atas rayuan kepada Mahkamah Agung (pada masa itu), rayuan kemudiannya dibenarkan, dan memandangkan isu mengenai notis kebankrapan dan petisyen si piutang telah dibangkitkan di kedua-
F dua forum dan dibentangkan sepenuhnya, maka sekiranya mana-mana isu tidak dibangkitkan di dalamnya, adalah terlalu lambat untuk berbuat demikian di sini kerana prinsip res judicata akan terpakai bagi mengikat isu yang tidak dibangkitkan sekali.

Adalah dihujahkan bahawa penyampaian notis kebankrapan dan petisyen si piutang adalah tidak elok kerana penyampaian bukanlah
G melalui salinan bermeterai dokumen-dokumen, dan penyampai proses tidak berkuasa untuk membuat penyampaian. Perayu juga menghujahkan bahawa penyampaian tidak dibuktikan kerana penentang telah gagal melampirkan salinan bermeterai notis kebankrapan dan petisyen si piutang kepada afidavit penyampaian. Seterusnya, ia dikatakan bahawa pegawai yang mengakusaksi petisyen
H si piutang bagi pihak si piutang yang mempetisyen tidak diberikuasa di bawah meterai syarikat. Isu-isu ini tidak dihujahkan di Mahkamah Tinggi atau Mahkamah Agung. Perayu juga menghujahkan bahawa terdapat pengakusaksian yang tidak mencukupi kerana identiti peguamcara yang mengakusaksi petisyen itu tidak dinyatakan. Adalah
I juga dihujahkan bahawa oleh kerana perayu telah menjalankan perniagaan di Ipoh di negeri Perak dan tinggal di sana dan tidak pun menjalankan perniagaan atau menetap di Kuala Lumpur, petisyen sepatutnya difailkan di Ipoh, Perak.

Diputuskan, membenarkan rayuan:

(1) Apabila sesuatu perkara di antara dua pihak telah dihakimi oleh sebuah mahkamah yang mempunyai bidang kuasa kompeten, mereka dan privi mereka tidak dibenarkan melitigasikan res judicata sekali lagi. Walau bagaimanapun, dalam kes ini, petisyen telah dikembalikan dan diarahkan didengar atas meritnya.

'Atas merit' bermakna bahawa mahkamah telah memutuskan bahawa ia mempunyai bidang kuasa untuk menghakimi isu yang dibangkitkan dalam kausa tindakan yang mana set fakta-fakta yang tertentu membangkitkan, dan bahawa penghakimannya atas kausa tindakan itu adalah penghakiman yang tidak boleh diubah, dibuka semula, atau diketepikan oleh mahkamah yang menyampaikannya atau mana-mana mahkamah yang mempunyai bidang kuasa setara meskipun ia boleh tertakluk kepada rayuan kepada mahkamah yang mempunyai bidang kuasa yang lebih tinggi.

Maka, dalam kes ini, perayu mesti dibenarkan membangkitkan semua isu bagi menentang petisyen si piutang sama ada dibangkitkan atau tidak dalam prosiding yang lebih awal supaya semua isu boleh 'mencapai keputusan muktamad'. Isu-isu yang ingin dibangkitkan oleh kedua-dua pihak ialah 'atas merit' (lihat ms 748C–E, 749E, I dan 750A); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 diikut.

(2) Selagi penyampaian dilakukan oleh seorang yang digaji oleh sebuah firma peguamcara dan selagi afidavit penyampaian yang difailkan menunjukkan bahawa afidavit yang dikatakan difailkan menerusi firma peguamcara itu, adalah tidak penting sekiranya orang tersebut yang digaji adalah dalam penggajian tetap atau sementara atau pada hakikatnya digaji pada dasar komisyen ad hoc bagi melakukan penyampaian proses bagi pihak peguamcara untuk si piutang yang mempetisyen. Perkataan-perkataan 'a person in their employment' dalam k 109 Peraturan-Peraturan Kebankrapan 1969 ('Peraturan tersebut') tidak boleh ditafsirkan untuk bermakna hanya orang dalam penggajian tetap si piutang atau peguamcaranya. Perkataan 'employment' mesti diberikan tafsiran yang lebih luas untuk tujuan-tujuan mentafsirkan k 109 Peraturan tersebut di mana penggajian hanya boleh dijalankan melalui kontrak perkhidmatan atau pun kontrak untuk perkhidmatan. Penyampaian dalam kes ini adalah penyampaian yang betul dan dirangkumi oleh makna dan tujuan k 109 Peraturan tersebut dan ini bermakna bahawa petisyen si piutang dan notis kebankrapan telah disampaikan dengan wajarnya (lihat ms 751A–B, F–I); *Dora bte Hj Adenan v Delta Finance Bhd* [1995] 3 AMR 2782 tidak diikut dan *Re Blackman, ex p Branfill* (1892) 40 WR 670 diikut.

(3) Oleh kerana objek notis kebankrapan adalah untuk menarik perhatian perayu bahawa notis kebankrapan memang telah dikeluarkan terhadapnya, tanpa mengira fakta bahawa salinan

sah dan bukannya salinan bermeterai telah disampaikan kepada perayu, penyampaian demikian walaupun tidak mematuhi Peraturan tersebut secara ketat tidak menyebabkan penyampaian menjadi tidak elok. Maka, terdapat penyampaian notis kebankrapan yang berkesan (lihat ms 754A–B); *Re Foo Hock Leng @ Foo Lew, ex p Southern Finance Co Bhd* [1994] 2 CLJ 658, *Au-Yong v Dicum & Anor* [1963] MLJ 349 dan *Kamaruddin bin Mohamed v United Motor & Works (M) Sdn Bhd* [1982] 1 MLJ 126 diikut; dan *Re MPLM Muthiah Chettiar, ex p SPN Ramanathan Chettiar* [1938] MLJ 233 tidak diikut.

(4) Kecacatan formal dalam notis kebankrapan boleh diubati dengan mudah oleh s 131 Akta Kebankrapan 1967 ('Akta tersebut'). Sekiranya penyampaian petisyen si piutang yang tidak bermeterai tidak dapat memperdaya perayu dengan munasabahnya, ia akan disahkan oleh s 131 Akta tersebut. Oleh itu, penyampaian salinan sah petisyen si piutang — meskipun bukannya salinan bermeterai petisyen — yang dilampirkan kepada afidavit penyampaian adalah memadai (lihat ms 755C–H); *Kamaruddin bin Mohamed v United Motor Works (M) Sdn Bhd* [1982] 1 MLJ 126, *Rengasamy Pillai v Comptroller of Income Tax* [1970] 1 MLJ 233 dan *Re Hj Yahya Lampang, ex p Sabah Development Bank Bhd* [1987] 2 MLJ 488 diikut.

(5) Dalam kes sebuah syarikat yang mengemukakan suatu petisyen oleh seorang pegawai yang diberikuasa berbuat demikian, adalah tidak perlu bahawa resolusi lembaga untuk menugaskan pemberikuasaan haruslah di bawah meterai, dengan syarat bahawa meterai syarikat dilekat bersama pemberikuasaan. Selagi seseorang diberikuasa di bawah meterai syarikat untuk bertindak di bawah s 148, maka dia menjadi seorang 'pegawai' di bawah Akta tersebut. Begitu juga, dalam s 133 Akta tersebut, seorang 'pegawai' yang diberikuasa mestilah merupakan seseorang yang telah diberikuasa 'di bawah meterai pertubuhan'. Di mana pemberikuasaan daripada pertubuhan diberikan kepada 'pegawai' di bawah meterai, bukti tentang pemberikuasaan demikian mestilah disediakan apabila dicabar. Tafsiran yang diberikan kepada k 215 oleh bank tersebut adalah salah kerana apa yang dinyatakan oleh kaedah itu adalah bahawa petisyen boleh dikemukakan oleh sebuah pertubuhan dalam nama sendiri atau dalam nama pegawai. Dalam kedua-dua keadaan, pegawai mestilah diberikuasa dengan wajarnya di bawah meterai dan s 133 akan mengatasi sebarang ketaksaan yang mungkin telah timbul di bawah k 215.

Saksi sumpah afidavit dengan jelasnya tidak diberikuasa di bawah meterai seperti yang diakui oleh mereka. Oleh itu, hujah perayu atas perkara ini dibenarkan (lihat ms 757I, 758A–D dan 759B); *Re Midgley* [1913] 108 LT 45, *Re Tomkins & Co* [1901] 1 KB 476, *Re Sanders, ex p Sanders* [1894] 1 Mans 382 dan *Re A Debtor (No 28 of 1917), ex p The Petitioning Creditors v The Debtor* [1917] KB 808 diikut.

(6) Pengakusaksian yang tidak mencukupi bukanlah kecacatan kerana nama firma telah dikenalpasti dengan betulnya. Andainya keperluan timbul, identiti peguamcara yang mengakusaksi boleh dipastikan dengan mudahnya (lihat ms 759I dan 760A).

(7) Menurut Arahan Amalan No 3 tahun 1993, semua petisyen hendaklah difailkan di negeri di mana perayu menetap dan bahawa dalam kes petisyen yang difailkan sebelum arahan amalan mula berkuatkuasa, pempetisyen harus memohon secara bertulis untuk memindah petisyen ke mahkamah negeri di mana penghutang menetap. Ini tidak dilakukan dalam kes ini. Namun demikian, tanpa mengira ini, mahkamah mempunyai bidang kuasa untuk menguruskan petisyen (lihat ms 760F–G).

Obiter:

Andainya penentang telah mengemukakan apa-apa bentuk pemberikuasaan yang diberikan kepada pegawai-pegawai di bawah meterai jika pun pemberikuasaan diberikan lama sebelum ini, mahkamah berkecenderungan untuk mengikut keputusan McCardie H dalam *Re A Debtor (No 28 of 1917), ex p The Petitioning Creditors v The Debtor* [1917] KB 808 di mana ia diputuskan bahawa sebuah pertubuhan boleh memberikuasa kepada seorang pegawai untuk mengemukakan suatu petisyen berhubung dengan perbuatan kebankrapan yang mungkin tidak berbangkit pada tarikh pemberikuasaan berlaku (lihat ms 759B–E).]

Notes

For cases on res judicata, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2892–2939.

For cases on the practice and procedure in bankruptcy, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1532–1564.

For cases on service of a notice of bankruptcy and creditor's petition, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1406–1408 and 1516–1517 respectively.

For a case on the attestation of a bankruptcy petition, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1496.

Cases referred to

A Debtor (No 28 of 1917), Re, ex p The Petitioning Creditors v The Debtor [1917] KB 808 (folld)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (folld)

Au-Yong v Dicum & Anor [1963] MLJ 349 (folld)

Blackman, Re, ex p Branfill (1892) 40 WR 670 (folld)

David Lim Hong Kee, Re, ex p Perwira Habib Bank (M) Bhd [1996] 1 AMR 105 (refd)

Dora bte Hj Adenan v Delta Finance Bhd [1995] 3 AMR 2782 (not folld)

Foo Hock Leng @ Foo Lew, Re, ex p Southern Finance Co Bhd [1994] 2 CLJ 658 (folld)

Hj Yahya Lampang, Re, ex p Sabah Development Bank Bhd [1987] 2 MLJ 488 (folld)
Kamaruddin bin Mohamed v United Motor Works (M) Sdn Bhd [1982] 1 MLJ 126 (folld)
MPLM Muthiah Chettiar, Re, ex p SPN Ramanathan Chettiar [1938] MLJ 233 (not folld)
Midgley, Re [1913] 108 LT 45 (folld)
PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd [1958] MLJ 113 (refd)
Perwira Habib Bank (M) Bhd v Samuel Pakianathan [1993] 2 MLJ 423 (refd)
Perwira Habib Bank (M) Bhd v Samuel Pakianathan a/l Jabamanickam [1993] 3 CLJ 349 (refd)
Rengasamy Pillai v Comptroller of Income Tax [1970] 1 MLJ 233 (folld)
Sanders, Re, ex p Sanders [1894] 1 Mans 382 (folld)
Sennar, The [1985] 2 All ER 104 (refd)
Tomkins & Co, Re [1901] 1 KB 476 (folld)
V David, Re, ex p United Asian Bank Bhd [1991] 2 MLJ 127 (refd)
Wee Chow Yong (Wee Chow Yong t/a Nienna Music Centre v Public Finance Bhd [1989] 3 MLJ 508 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 5(2), 6(1), 131, 133, 148
Bankruptcy Rules 1969 rr 4, 97, 102, 109, 215

PC Neoh (*Suhaimi Khor Zulkifli & Chang*) for the respondent/judgment creditor.

O Thaiyub Khan (*Thaiyub Khan Othuman & Co*) for the appellant/judgment debtor.

Cur Adv Vult

Kamalanathan Ratnam JC: The judgment creditor, who is the respondent bank in this appeal, obtained an O 14 judgment against the judgment debtor who is the appellant as one of the guarantors in respect of a term loan and an overdraft account given by the respondent to one San Hong Brick Sdn Bhd in receivership. The judgment dated 26 February 1988 was for a sum of RM3,861,938.37 being the outstanding amount of the term loan together with interest accruing at the rate of 14%pa from the first day of March 1986 to the date of realization and RM2,702,385.36 being the outstanding amount of overdraft together with interest accruing at the rate of 14%pa from the first day of March 1986 to the date of realization and costs of RM350. The counterclaim against the appellant is pending in another suit.

Background facts

On 15 January 1990, the respondent took out a request for issue of bankruptcy notice and claimed as follows in the bankruptcy notice:

Principal sum — Term Loan	RM3,861,938.37
Interest on RM3,861,938.37 at the rate of 14%pa from 1/3/86 to 15/1/90 (1,417 days)	RM2,770.139.79
Principal sum — Overdraft	RM2,702,885.36
Interest on RM2,702,885.36 at the rate of 14%pa from 1/3/86 to 15/1/90. (1,417 days)	RM1,936,998.91
Costs	RM350.00
Paid into account	—
	RM11,272,312.43

On 19 March 1990, the respondent filed a creditor's petition (encl 8) together with the affidavit of truth of statements in petition (Form 11), which was affirmed on 16 March 1990.

The appellant filed an application to set aside the creditor's petition (encl 11) on various grounds.

On 11 September 1990, VC George J (as his Lordship then was) heard encl 14 and dismissed the creditor's petition with costs on the grounds that there still existed a counterclaim and that since there was an allegation of the respondent being a secured creditor, there was therefore non-compliance with s 5(2) of the Bankruptcy Act 1967 ('the Act').

The respondent appealed to the Supreme Court against the said decision vide Supreme Court Civil Appeal No 02–404–90. The said appeal was heard and allowed on 17 November 1992 (see *Perwira Habib Bank (M) Bhd v Samuel Pakianathan* [1993] 2 MLJ 423). The respondent's solicitors then promptly wrote to the High Court Registry requesting for a hearing date for the creditor's petition.

The appellant himself acting on his own behalf filed another application (encl 23) for an order to set aside the creditor's petition supported by a lengthy affidavit (encl 22). Enclosure 23 was fixed for hearing on 22 February 1994. On 22 February 1994, when encl 23 came up for hearing, both parties sought an adjournment and encl 23 was adjourned to 3 March 1994 and subsequently to 5 April 1994. In the meantime, on 28 February 1994, the solicitors for the appellant filed a summons in chambers for setting aside the service of the bankruptcy notice and creditor's petition (encl 26) supported by yet another of the appellant's affidavit (encl 25). The summons in chambers was fixed for hearing on 5 April 1994. On 5 April 1994, encll 8, 23 and 26 came up for hearing and encl 26 was dismissed on 16 April 1994. As for encl 23, there was no record to show that it was decided upon on 22 February 1994 as

claimed by both parties. However, as the senior assistant registrar ('the SAR') was told that a notice of appeal dated 24 February 1994 against the purported decision made by the SAR on 22 February 1994 (encl 28), again filed by the appellant on his own behalf, had been fixed for hearing before the judge on 22 June 1994, the SAR decided that there was no need for him to hear encl 23 and adjourned to 22 April 1994 for the hearing of encl 8. On 22 April 1994, the SAR made the receiving order and adjudication order.

On 18 April 1994, the appellant had filed encl 33 which was an application for an interim stay of the hearing of encl 8 until the disposal of the appeal by the appellant against the dismissal of his encll 23 and 26. He contended in his affidavit that he had merits. The appeal against the dismissal of encl 26 was filed on 16 April 1994 as encl 38.

The appellant also filed an application (encl 36) to stay execution on the receiving and adjudication orders pending disposal of the appeals against the SAR's decisions on encll 23, 26 and 8.

In the meantime, the appellant also filed an appeal (encl 39) in respect of the order granted by the learned SAR regarding encl 8 on 22 April 1994.

On 28 December 1995, three enclosures came up for hearing before me, namely:

(1) enclosure 28, that is the appeal against the decision of the learned SAR granted on 22 February 1994;

(2) enclosure 38, that is the appeal against the dismissal of encl 26 granted on 16 April 1994; and

(3) enclosure 39, that is the appeal against the granting of the receiving and adjudication orders on 22 April 1994 in respect of encl 8.

Miss Neoh, counsel for the respondent/plaintiff, said that she was raising a preliminary objection. She confirmed having given notice of her intention to raise the preliminary objection to the appellant's solicitor. Her preliminary objection was that the matter was res judicata.

The preliminary objection

The respondent argued that since VC George J had already heard encl 14, ie the creditor's petition on 11 September 1990 and dismissed the same and upon appeal to the (then) Supreme Court, the appeal then being allowed, and since the issue regarding the bankruptcy notice and the creditor's petition had all been raised at both forums and fully canvassed, then, if any issue was not raised there, it was too late in the day to do so herein as the principle of res judicata would apply to bind even issues not raised therein. By consent, both parties had agreed to raise the following issues before me, that is:

(1) that the service of the bankruptcy notice and creditor's petition was bad;

(2) that the judgment dated 26 February 1988 which formed the basis of the bankruptcy notice was against several defendants and this appellant being only one of them; and

(3) that the officer who attested the creditor's petition on behalf of the petitioning creditor was not authorized under the seal of the company.

To a question by the court, En Thaiyub Khan for the appellant confirmed that these issues were never argued before VC George J nor were they argued before the Supreme Court. In *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, the (then) Supreme Court held that when a matter between two parties had been adjudicated by a court of competent jurisdiction, they and their privies are not permitted to litigate once more the res judicata, as the judgment becomes the truth between such parties. An estoppel per rem judicatum had been created as a result. The Supreme Court further held that the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently.

On this decision then, the appellant would have been bound by the principle of res judicata even though it was admitted that these issues were never argued before the learned judge. However, the decision of the Supreme Court in *Perwira Habib Bank (M) Bhd v Samuel Pakianathan a/l Jabamanickan* [1993] 3 CLJ 349 delivered by Mohd Azmi SCJ at p 355 directed as follows:

> The petition was therefore restored and should accordingly be heard on its merits.

'On its merits'

In the light of the Supreme Court's direction, I had to consider what constitutes 'merits' in this case. Is it every ground whether technical, or substantive available to the appellant or otherwise.

In *Jowitt's Dictionary of English Law* (2nd Ed) at p 1177. 'merits' is defined as follows:

> *Merits.* A person is said to have a good cause of action or defence on the merits when his claim or defence is based on the real matters in question, and not on any technical ground. ... The term 'merits' is to be understood in a technical sense, and is not confined to strictly moral and conscientious defences; thus defences of Statute of Frauds 1677, s 4, or the Limitation Act 1936, and of bankruptcy and infancy, are defences on the merits.
>
> If a defendant inadvertently allows judgment to go by default, the court will not, as a rule, set the judgment aside under RSC Ord 13 r 9, and allow him to defend unless he makes an affidavit of merits, that is, an affidavit showing that he has a substantial ground of defence to the action.

In *Words and Phrases Legally Defined* (3rd Ed) at p 347, 'upon the merits' had been defined as follows:

A hearing on the merit is one in which the issues of fact or law, or both, between the parties are fought out to a final conclusion binding upon the parties — a decision 'upon the merits'. It does not seem to matter that the determination of one or some only of the issue may suffice to decide the whole controversy, or that the issues may be decided on facts which are the subject of admission and not of dispute or even of evidence. Without purporting to make an exhaustive enumeration, or to state all the qualifications which may be necessary, a hearing may be said not to have been on the merits if it resulted in a decision which was not final but analogous rather to a non-suit, or if, for some such reason as withdrawal, want of jurisdiction, non-compliance with some preliminary requirement, defect in the information, or other technical or procedural informality or irregularity, it did not result, or could not have resulted, in a decision on the merits, final in its nature and capable of supporting (in criminal cases) a plea of autrefois acquit or autrefois convict: *Bridie v Messina* [1965] NSW 332 at pp 337–338, per Sugerman J.

In *The Sennar* [1985] 2 All ER 104 at p 106, Lord Diplock interpreted the term 'on the merits' as follows:

It is often said that the final judgment of the foreign court must be 'on the merits'. The moral overtones which this expression tends to conjure upon may make it misleading. What it means in the context of judgment delivered by courts of justice is that the court has held that it had jurisdiction to adjudicate on an issue raised in the cause of action to which the particular set of facts give rise, and that its judgment on that cause of action is one that cannot be varied, reopened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction.

After interpreting the term, his Lordship at p 107 held as follows:

At the hearing of the appeal from that stay, it was repeatedly urged on your Lordships that all that the judgment of the Dutch Court of Appeal had done was no more than to hold that it had no jurisdiction over the dealers' claim against the shipowners and so did not fall into the category of a judgment on the merits. But this is to confuse issue estoppel with cause of action estoppel.

I ventured in the course of the hearing to summarize in a single sentence what the Dutch Court of Appeal had decided by its judgment of 21 March 1980: on the particular set of facts on which the dealers relied in the Dutch action, their only claim against the shipowners is for breach of the contract of carriage which, as a result of the Sudanese jurisdiction clause that it contains, is enforceable in the courts of the Sudan and nowhere else.

In my view, that constitutes a final judgment 'on the merits' (as I have interpreted that term) on two issues: the first is that the dealers have no claim against the shipowners for their wrongful act of inserting a false date on the bill of lading, other than a claim for breach of the contract of carriage; the second is that the effect of the jurisdiction clause in the contract of carriage is to make any remedy for breach of that contract enforceable only in a Sudanese court unless the shipowners elect otherwise.

Having considered the above authorities, I ruled that the appellant must be allowed to raise all issues to oppose the creditor's petition whether or

not raised earlier in these proceedings so that all issues may be 'fought to a final conclusion'. In the context of this case, due to its quasi-penal nature, I held that the issues which both parties wanted to raise by consent would be 'on the merits' following the interpretation of Lord Diplock in *The Sennar*. I then directed parties to give written submissions.

By whom should the bankruptcy notice and creditor's petition be served

The appellant argued that the service of the bankruptcy notice dated 15 January 1990 and creditor's petition dated 16 March 1993 was bad and that the process server had no authority to effect service.

It was argued that since the bankruptcy notice was served by one Manoharan a/l Arumugam c/o Seljena Services Sdn Bhd, such service was bad. Similarly, it was argued that since the creditor's petition was served by one Jeevajothi Nathan a/l Sinnatamby, c/o Seljena Sdn Bhd such service was bad too pursuant to r 109 of the Bankruptcy Rules 1969 ('the Rules') which provides as follows:

> A creditor's petition shall be personally served and service shall be effected by an officer of the Court or by the creditor or his solicitor or a person in their employment by delivering a sealed copy of the petition to the debtor.

As the process servers did not state that they were in the employment of the court or the creditor or his solicitors, it was submitted by the appellant that the clear assumption was that these two process servers were not employed by the creditor or his solicitors but were persons who served documents for a fee.

The appellant relied on *PT Pelajaran Nasional Indonesia v Joo Seang & Co Ltd* [1958] MLJ 113, wherein Rigby J said at pp 115–116:

> ... where the law provides a particular method or form of procedure for effecting service, or a particular place at which, or to which, service may be effected, then there must be strict compliance with those provisions, and the court will set aside a judgment obtained by default where the requirements have not been complied with.

The appellant also relied on *Dora bte Hj Adenan v Delta Finance Bhd* [1995] 3 AMR 2782 wherein Elizabeth Chapman JC in interpreting r 109 held as follows at p 2783:

> In my view, the intended meaning of 'a person in their employment' in r 109 of the Bankruptcy Rules would mean a person in the permanent employment of the creditor or his solicitor, and not one who would receive a commission on a case to case basis as is the case here. The rule must be strictly complied with as I think the object of the rule is to secure that a responsible person shall effect the service and make the affidavit of service.

And further at p 2784, the learned judicial commissioner continued:

> In the case before this court, a private individual who provides delivery services was retained by the advocate firm to serve the bankruptcy notice, as distinct from the clerk of the advocate firm. This cannot, in my view, be considered proper service within the meaning and intent of r 109 and accordingly I hold that service in this case is not proper and disallow making an order for receiving order and adjudicating order.

With respect, I take the view that so long as service is effected by a person employed by a firm of solicitors and so long as the affidavit of service filed shows that the said affidavit is filed through that firm of solicitors, it is immaterial if the said person employed is in the permanent or temporary employment or indeed employed on ad hoc commission basis to effect service of the process on behalf of the solicitors for the petitioning creditor. The words 'a person in their employment' in r 109 of the Rules cannot be interpreted to mean a person only in the permanent employment of a creditor or his solicitors.

In *Re Blackman, ex p Branfill* (1892) 40 WR 670, a similar provision in r 154 of the English Bankruptcy Rules 1886 which provided that 'a petition shall be served upon the debtor by an officer or bailiff or the creditor of his solicitor, or by some person in their employ; ...' was called into interpretation by the court when an application was made to the county court registrar to direct substituted service under r 154 but the registrar refused this application on the ground that, in his opinion, the attempts made by a pertinent person concerned to effect personal service were not made by a person in the employ of the creditor or his solicitor within the meaning of that rule. On appeal, it was argued for the appellant that '... there is nothing in the rule which says that the person who makes personal service is to be in the permanent employ'. At p 671, it was held by Pollock B as follows:

> ... I suppose the object of the rule was to prevent service by an unauthorized person. In the case of *Re Denman, ex p Denman* 29 WR 616, it was held that a debtor's summons might be served by any person authorized by the creditor, and service by an accountant who had been in the habit of serving summonses for the creditor's solicitor was held to be good service.

With respect, I would agree with the above interpretation. The word 'employment' must in my view be given a wider interpretation for the purposes of interpreting r 109 of the Rules whereby employment can be by way of contract of service or even contract for service. A contract of service is one in which a person undertakes to serve another and to obey his reasonable orders within the scope and duty of the undertaking.

Assuming that such employment amounted to a contract for service in that the process serving firm was contracted by a firm of solicitors to serve the said bankruptcy notice and creditor's petition and, that for each service, payment is to be effected separately, even in such an instance, the process server is bound by the directions and instructions of the creditor or his solicitor. Business efficacy warrants recognition of service by independent process servers. It would be a great waste of time and effort for a clerk in a legal firm to chase after elusive recipients of process from town to town or state to state. Much work will grind to a stand still. It would be prudent and economical to engage the services of independent process servers to effect such service either on the basis of a contract of service or a contract for service. Hence, I hold that service in this case is proper service and falls well within the meaning and intent of r 109 of the Rules and, it would follow therefore that the creditor's petition and bankruptcy notice were properly served.

Whether service of bankruptcy notice and creditor's petition ought to be by way of a sealed copy or whether a true copy would suffice

The provisions in the law regarding service of bankruptcy notice and creditor's petition are as follows:

Section 6(1) of the Act provides as follows:

> A creditor's petition shall be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts, and *shall be served as prescribed.* (Emphasis added.)

Rule 97 reads:

> A bankruptcy notice shall be served and service thereof shall be proved in the like manner as is by these Rules prescribed for the service of a creditor's petition.

Rule 109 provides that 'a creditor's petition shall be personally served and service shall be effected ... by delivering a sealed copy of the petition to the debtor'.

The affidavit of service filed by the solicitors for the appellant showed that only 'a true copy of the bankruptcy notice dated 15 January 1990' had been served.

As for service of the creditor's petition, 'a signed and sealed copy of the creditor's petition' was served. The appellant therefore argued that the service of the bankruptcy notice was not in accordance with the Rules. The respondent submitted that the more pertinent question to be asked is whether the appellant was in fact served with the bankruptcy notice and creditor's petition.

It was further argued by the respondent that the appellant in his application to set aside the service of the bankruptcy notice and creditor's petition (encl 26) did not deny having received a 'true' copy of the bankruptcy notice and a signed and sealed copy of the creditor's petition. The respondent referred me to *Re Foo Hock Leng @ Foo Lew, ex p Southern Finance Co Bhd* [1994] 2 CLJ 658 where Siti Norma Yaakob J (as her Ladyship then was) held that a formal defect will not invalidate a bankruptcy proceeding unless such defect had caused substantial injustice to the debtor. In that case, the debtor was not served with a sealed copy of the bankruptcy notice but only with a certified true copy contrary to r 97. Her Ladyship held that apart from their form, the substance of the certified copy of the bankruptcy notice was the same as that of the sealed copy. Under the circumstances, she held that the debtor could not be said to be prejudiced by being served with the certified copy.

I consider next the decision of McElwaine CJ in *Re MPLM Muthiah Chettiar, ex p SPN Ramanathan Chettiar* [1938] MLJ 233 wherein the learned Chief Justice held that a copy of the bankruptcy notice for service upon the debtor must be sealed with the seal of the Supreme Court. If it is not sealed with the seal of the Supreme Court, the omission is not a mere formal defect, but it renders the service upon the debtor a nullity and being a material defect, the court had no power to waive it.

A McElwaine CJ's decision was not followed by another Chief Justice of this country in *Au-Yong v Dicum & Anor* [1963] MLJ 349 where the debtor opposed the bankruptcy petition on the grounds, inter alia, that the bankruptcy notice was not duly served on him because it did not bear the seal of the court and the signature of the Registrar under whose hand it was issued contrary to rr 95 and 107 of the (then) Bankruptcy Rules 1921. B Thompson CJ sitting in the Court of Appeal held that even if service of an unsealed and unsigned copy of the bankruptcy notice was contrary to the Bankruptcy Rules, it was a mere irregularity which had occasioned no injustice to the debtor. His Lordship had occasion to comment on the earlier decision of McElwaine CJ at p 351:

C

> I think, however, the matter merits a little further consideration by reason of the case of *Muttiah Chettiar, ex p Ramanathan Chettiar* [1938] MLJ 233. In that case a bankruptcy notice was served by exhibiting to the debtor a sealed copy and handing him a copy which was unsealed. Sir Percy McElwaine took the view that this service was not in accordance with the rules then in force in the Straits Settlements (which do not materially differ D from those in force here today); that the sealing was not a mere formality and that without the seal on the copy delivered the bankruptcy notice was bad. Consequently, the alleged act of bankruptcy, which was non-compliance with the notice, was not an act of bankruptcy and the petition with which he was concerned must be dismissed.
>
> E With great respect, I am unable to agree that that case should be followed.
>
> In my view, consideration of the question must commence from s 131 of the Bankruptcy Ordinance which reads as follows:
>
> > 'No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is F made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.'
>
> That section is the same as s 147 of the English Act of 1914 and it is also the same as s 128 of the Straits Settlements Ordinance (Cap 45) which was in force in Malacca when *Muthiah Chettiar*'s case was decided and which G apparently was not referred to or considered in that case.

In *Kamaruddin bin Mohamed v United Motor & Works (M) Sdn Bhd* [1982] 1 MLJ 126, the Federal Court had to consider the question whether the failure to effect the posting of a bankruptcy notice by substituted service within the time described in respect of one of the three modes of service H ordered by the court had rendered the whole of the substituted service void and of no effect. Abdul Hamid FJ said at p 127:

> It is abundantly clear that the bankruptcy notice was brought to the knowledge of the appellant as is revealed from the appellant's own admission in the affidavit affirmed on 6 October 1976. This fact confirmed that there was I effective service on the appellant. A breach of any further direction or term in the order designed to achieve the same could not in the circumstances be said to have occasioned substantial failure of justice. Such a breach could not therefore be regarded as an illegality but a mere irregularity which was curable.

Since the object of the bankruptcy notice was to bring to the attention of the appellant that the bankruptcy notice had indeed been issued against him, I am bound by the dictum of the Federal Court in *Kamaruddin bin Mohamed* to hold that notwithstanding the fact that a true copy and not a sealed copy was served on the appellant, such service though strictly not in compliance with the Rules, did not render the service bad and I hold that there had been effective service of the bankruptcy notice.

With regard to proof of service, r 111 provides as follows:

> 111 (1) Service of the petition shall be proved by affidavit.
>
> (2) The affidavit with a sealed copy of the petition annexed and referred to as an exhibit shall be filed in Court forthwith after service.

The form of the affidavit of service for the bankruptcy notice is Form 6 and that for the creditor's petition is Form 14. The deponent in Form 6 must affirm that he served the bankruptcy notice '... duly sealed with the seal of the Court ...' and annex to the affidavit 'a sealed copy of the said notice ...'. Form 14 also has similar affirmations that the deponent did serve the creditor's petition, '... duly sealed with the seal of the Court ...' and in para 2 refers to '... a sealed copy of the petition hereunto annexed ...' and 'affirmed at, etc ...' by the 'bailiff, creditor, solicitor or his clerk'.

Whether affidavits of service must be annexed with sealed copy of bankruptcy notice or creditor's petition as the case may be as proof of service

In its written submission, the respondent argued that there was no requirement under the Rules that a sealed copy of the bankruptcy notice and creditor's petition be annexed to the affidavits of service. All that is required for service is that a sealed copy of the bankruptcy notice and creditor's petition be served 'personally on the debtor' (see r 109). This argument is jumbled and is wrong in that two things are mentioned therein, that is, proof of service and mode of service. Both the mode and proof specified in the Rules require that the sealed copies be served and the sealed copies be annexed to the affidavits of service. The appellant referred to Forms 6 and 14 to support his contention that service had not been proven as the respondent had failed to annex sealed copies of the bankruptcy notice and creditor's petition to the affidavits of service. The respondent referred me to r 4 of the Rules which provides as follows:

> The forms in the Appendix, where applicable, and where they are not applicable, forms of the like character, with such variations as circumstances may require shall be used. Where such forms are applicable any costs occasioned by the use of any other or more prolix forms shall be borne by or disallowed to the party using the same unless the court shall otherwise direct.

It was thus argued that the respondent had not violated any rule by affirming a form of affidavit stating that a copy of the document is annexed and then annexing a copy of the bankruptcy notice or creditor's petition to its affidavits. It was submitted that this was a permitted variation pursuant to r 4.

A With regard to the attack by the appellant regarding non-compliance with the set forms, I can do no better than to repeat and adopt the views of Abdul Hamid FJ in *Kamaruddin bin Mohamed* at p 128:

> In the course of submission by counsel for the appellant the attention of this court was drawn to certain forms as set out in *Atkin's Court Forms* Vol 7 at
B pp 230 and 233, Forms 83, 87 and 88. It needs no emphasis that they are recognized but it should be observed that proforma of forms to be used in bankruptcy proceedings is given in the appendix to the Bankruptcy Rules 1969 and be that as it may these forms are intended to be used with modifications as may be necessary. There is clearly no strict requirement that *Atkin*'s forms must be rigidly followed.

C I am further persuaded by the decision of the Privy Council in *Rengasamy Pillai v Comptroller of Income Tax* [1970] 1 MLJ 233 that a formal defect in the bankruptcy notice could easily be cured by the (then) s 131 of the Bankruptcy Ordinance 1959 already referred to earlier. (The Bankruptcy Ordinance 1959 had since been repealed and replaced by the Bankruptcy
D Act 1967 and s 131 of the Ordinance reads as s 131 in the 1967 Act.)

As to the defects regarding the service of the petition, the process server had deposed to having served a signed and sealed copy of the creditor's petition. There can therefore be no complaint on this. However, as to the complaint that a copy of the creditor's petition was annexed to
E the affidavit of service and not a sealed copy, I would apply the same reasoning as I had done with regard to the service of the bankruptcy notice. However, upon checking the court record, it was found that both the affidavits of service encll 7 and 10 were annexed with sealed copies of the bankruptcy notice and creditor's petition. The appellant did himself sign on the sealed copy of the bankruptcy notice annexed though there was
F no acknowledgement on the sealed copy of the creditor's petition. Furthermore, after service of the bankruptcy notice on 7 February 1990, the appellant did write in on his own office letterhead a letter dated 20 February 1990 and he also filed an affidavit of even date. As for the creditor's petition, after service thereof, the appellant acting on his own
G behalf also filed a notice in encl 14 and an affidavit (encl 13) wherein the appellant referred specifically to the creditor's petition addressed to him at Restoran Mardi, that this is, the place where the bankruptcy notice was also served on him. I am of the view that no substantial injustice was done to the appellant. I am fortified in this view by the judgment of Abu Mansor J (as his Lordship then was) in *Re Hj Yahya Lampang, ex p Sabah*
H *Development Bank Bhd* [1987] 2 MLJ 488 where his Lordship held that the service of an unsealed creditor's petition could not reasonably have misled the appellant and therefore it would be validated by s 131 of the Act.

At this juncture, it is meet that I should point out that it is the duty of counsel concerned to verify the facts in every case and submit upon
I them. It is not for this court to verify every statement of fact submitted. Clearly, injustice would have befallen the respondent had the court itself not checked the records but merely relied on the submissions of counsel. Counsel would be failing in his duty in not submitting on facts in his client's favour, let alone, in assuming the wrong facts. Had counsel been

unsure or been misled by the affirmations in the process server's affidavits (prepared by the same solicitors) where the word 'copy' was used to mean a sealed copy and not a photostated copy, then counsel should have conducted a search on the court file, or been more careful in the preparation of the affidavits.

In *Re V David, ex p United Asian Bank Bhd* [1991] 2 MLJ 127 three issues were raised, that is whether there was compliance with r 99(1) of the Rules, which is whether the petition was signed in the presence of a witness. The second issue was whether there was evidence that the attorney was authorized by the respondent to sign the petition and thirdly whether the service of a true copy instead of a sealed copy of the petition on the appellant rendered the service of the petition ineffective. Zakaria Yatim J (as his Lordship then was) having considered all three issues then considered s 131 for its curative value. This is what he said at p 128:

> What the court has to consider now is whether substantial injustice has been caused by these defects and that the injustice cannot be remedied by any order of this court. In my opinion, in the absence of any proof, the creditor's petition was not signed by a person authorized by the judgment creditor. Furthermore, the petition does not state that it was signed by that person in the presence of a witness. These are serious defects and substantial injustice would be caused by these defects. The injustice cannot be remedied by any order of this court.
>
> In the circumstances, I order that the petition be dismissed with costs.

It would seem clear that his Lordship considered the first two issues as incurable. Since no reference was made to the third issue, I am respectfully of the view that his Lordship must have reasoned that the service of a true copy of the creditor's petition was sufficient as both my learned brother and I are bound by the Federal Court decision in *Kamaruddin bin Mohamed.*

Want of authority under seal of the corporation of the officers of the petitioning creditor

The next point taken by the appellant was with reference to s 133 of the Act and r 215 of the Rules:

Section 133 reads:

> For all or any of the purposes of this Act —
>
> (a) a corporation may act by any of its officers authorized in that behalf under the seal of the corporation; ... .

Rule 215 reads:

> Where a corporation presents a petition or takes any other action under this Act, the officer of the corporation may act in his own name, stating that he is such officer duly authorized under seal; but a petition may be presented by the corporation, and signed by the officer on its behalf. Any person chosen by the corporation to act for it as agent, is an 'officer' within section 133, and if duly authorized under seal can act for the corporation.

The creditor's petition filed herein reads:

> We, Perwira Habib Bank Bhd ... by Tan Kwe Hee and Ab Rahim bin Hassan, the Manager and Assistant Manager respectively duly authorized by the company to sign ...

and the creditor's petition was signed by the said persons as being duly authorized by the company. Similarly, the affidavit verifying truth of statement in the petition dated 16 March 1990 as required under s 6(1) of the Act states as follows:

> We, Tan Kwe Hee and Ab Rahim bin Hassan, the Manager and Assistant Manager respectively of Perwira Habib Bank Malaysia Bhd duly authorized to act for and on its behalf for all or any of the purposes of the Bankruptcy Act 1967, the petitioner named in the petition hereunto annexed, ...

The appellant argued that nowhere in the petition or in the affidavit did the signatories say that they were authorized under seal of the company.

The respondent in reply to this argument submitted that there are three limbs to r 215, ie:

> (a) ... this officer of the corporation may act in his own name, stating that he is such officer duly authorized under seal.
>
> (b) but a petition may be presented by the corporation, *and signed by the officer on its behalf.*
>
> (c) any person chosen by the corporation to act for its as an agent, is an 'officer' within s 133 and if duly authorized under seal can act for the corporation. (Emphasis added.)

The respondent submitted that limb (b) in this instance applied and therefore the issue of 'under seal' ought not to be considered by the court.

Clearly, the words 'under seal' as is required under s 133 of the Act read with r 215 of the Rules is missing from the creditor's petition and the affidavit. Furthermore, there was no evidence presented to this court to show that both these officers had indeed been authorized under seal.

In *Re Midgley* (1913) 108 LT 45, it was held that there was sufficient evidence if the company's seal is affixed to a copy of the letter of authority which constitutes the officer's authority. At p 47, Phillimore J held:

> Dealing first with the technical objection to the petition, I am of opinion that the action of the directors was not ultra vires. The board resolved to authorize Mr Blackman to present the petition, and thereupon such authority was drawn up and the seal of the company was affixed to it in the presence of two directors and of the secretary of the company. I am satisfied that such procedure is what is required under s 148 of the Bankruptcy Act 1883.

Section 148 above is similar to s 133 of our Act. Hence, it can be seen in the case of a company presenting a petition by an officer authorized in that behalf, it is unnecessary that the resolution of the board to delegate its authority should be under seal, provided that the seal of the company is affixed to the authority.

In *Re Tomkins & Co* [1901] 1 KB 476, the Court of Appeal held that even a clerk who had been so authorized was an 'officer' within the meaning of s 148 of the Bankruptcy Act 1883. By a resolution of the

directors dated 10 November 1892, the clerk was authorized under the seal of the company to take all necessary steps in bankruptcy against debtors to the company on behalf of the company.

Rigby LJ held at p 479 as follows:

> No doubt when we are dealing with other enactments, such as those relating to applications to make an officer of a company liable, it may be necessary to determine what is meant by an 'officer', and who is an officer; but, in my opinion, any person bona fide chosen by a company to be their agent for the presentation of a petition in bankruptcy becomes thereby an officer of the company for the purpose. Accordingly, the person who was originally nominated by the company in this case, though only a clerk of the company, and not in the ordinary sense an officer of the company before he was appointed under the seal of the company, became thereby, sufficiently for the purposes of the Act, an 'officer' of the company to present this petition.

The principle which I draw from the above case is that so long as a person is authorized under seal of the company to act under s 148, he therefore becomes an 'officer' under the Act. Likewise, in s 133 of the Act, an 'officer' duly authorized must be one who had been authorized 'under the seal of the corporation'.

In *Re Sanders, ex p Sanders* [1894] 1 Mans 382, the petition was not sealed with the seal of the company, but was signed by the secretary, and he made the usual statutory affidavit: (1) that the statements in the petition were within his own knowledge; and (2) 'that I am the secretary of the said company, and that I am duly authorized under the seal of the said company to present such petition and to make this affidavit'. At the hearing, the debtor challenged the secretary's authority to present the petition though this was not raised in the debtor's notice of objection under r 160(3) (in pari materia with r 117 of the Rules). Though the appeal by the debtor was dismissed, Vaughan Williams J at p 386, with a view to settling the practice, stated how the matter stands as follows:

> As to matter which the debtor has given no notice to dispute under r 162, where, as here, for instance, the debtor raises a point at the hearing of which no notice has been given, the case is different, there is no express provision in the rules; but in practice, if the debtor does in such a case require proof of material matters, and such proof is not forthcoming, the court will grant an adjournment in order that the proof may be given, though no notice has been given. I entirely agree that the debtor is in mercy, and if the registrar, in the exercise of its discretion, says that he does not wish for proof of such matters outside the notice, he may do so — he is acting within his discretion. But on the other hand, I should not like it to be supposed that the petitioner may go to court thinking he need not prove anything which the debtor has not given him notice to prove, and I say that because bankruptcy is a quasi-penal proceeding, and must be treated strictly. The petitioner, therefore, ought to go provided with proof of all essentials; for instance, in a case like this, with proof of authority by the company to present the petition. A prudent petitioner would, I am of opinion, go armed with such proof, and speaking for myself, I should require it to be supplied whether notice to produce had been given or not. But if the court is satisfied that the demand

A of proof is dilatory, it would not require it — to do so would be to encourage technical objections.

It is to be noted that in each of the cases above cited, the authority from the corporation was given to the 'officer' under seal and proof of such authority must be furnished when challenged. In the instant case, the B deponents to the affidavit were clearly not authorized under seal as admitted by them. Had the respondent produced any form of authorization given to these officers under seal even if such authorization was given long ago, I could have considered it but none was produced. I would then have been inclined to follow the decision of McCardie J in *Re A Debtor (No 28 of* C *1917), ex p The Petitioning Creditors v The Debtor* [1917] KB 808 at p 812, where his Lordship stated as follows:

> ... s 149 of the Bankruptcy Act 1914 [in pari materia with s 133 of the Act] should be construed, not narrowly, but broadly. It is obvious that many business companies take advantage of s 149, and to adopt a narrow view of
> D the section ... would be to disable such companies from conferring power upon their secretary, or their manager or even their managing director, to present petition in futuro. Business convenience requires, in my view, a liberal interpretation of s 149. The words 'in that behalf' in the section are not intended to limit the operation of the section, but are intended to relate to the totality of operations which may take place by virtue of the Bankruptcy
> E Act. Under the section, I think it is clear that a corporation may grant an authority to an officer to present a petition in the future in respect of acts of bankruptcy which may not have arisen at the date when the authority was given.

It would thus be of no great inconvenience to the companies concerned to F have authorized their officers in such manner. This not being done, I therefore uphold the appellant's submission on this point. The interpretation given to r 215 by the respondents would appear at first glance to be correct but upon consideration, it is wrong as all that the rule states is that petition may be presented by a corporation in its own name or in the name of the officer. In both instances, the officer must be duly G authorized under seal and s 133 would override any ambiguity that may have arisen under r 215.

At this juncture, I should state that both counsel had not provided me with any authorities with regards to the interpretation of s 133 or r 215. I am however greatly assisted by the research done by my deputy registrar H both on this and the other points raised in this appeal.

Attestation

The appellant submitted that the identity of the solicitor who attested the petition is not stated. There is a mere signature of the solicitor with no I name save the name of the firm. It was thus submitted that the attestation was vague and ought to be considered as insufficient attestation. Rule 102 provides as follows:

Attestation

Every bankruptcy petition shall be attested. If it be attested in the Federation, the witness must be a Solicitor or Federal Counsel or Magistrate or Official Assignee or Registrar. If it be attested out of the Federation the witness must be a Judge or Magistrate or a Counsel or Vice-Counsel or a Notary Public.

I am of the view that this is not a defect as such since the name of the firm is properly identified. If the need arises, the identity of the solicitor attesting could easily be ascertained.

Place of filing of petition

The final point raised by the appellant related to the place of filing of the petition. It was contended that since the appellant had carried on business in Ipoh in the state of Perak and resided thereat and did not even carry on business nor reside in Kuala Lumpur, this petition ought to have been filed in Ipoh, Perak. I have sufficiently covered this aspect of the case in my judgment in *Re David Lim Hong Kee, ex p Perwira Habib Bank Malaysia Bhd* [1996] 1 AMR 105 wherein I had held at p 126 in concurrence with Lim Beng Choon J that:

> ... pursuant to art 121(1) of the Federal Constitution, a High Court located in Penang or at Alor Setar is but a branch of the High Court in Malaya and each branch of the High Court in Malaya located in any state has concurrent jurisdiction to entertain any civil proceedings regardless of whether the cause of action arose in another state. However, the territorial limits of the two High Courts have been defined by para (a) and (b) of art121.
>
> It was this same principle that Edgar Joseph Jr J (as his Lordship then was) adopted in *Wee Chow Yong (t/a Nienna Music Centre) v Public Finance Bhd* [1989] 3 MLJ 508. In the said case, the matter was filed in Penang whereas the debtor was at all material times resident in Alor Setar.

However, pursuant to Practice Direction No 3 of 1993 which came into force on 1 April 1993, all petitions are to be filed in the state in which the appellant resides and that in the case of a petition filed before the coming into effect of this practice direction, the petitioner ought to apply in writing to transfer the petition to the court of the state where the debtor resides. Regrettably, this was not done in this case. However, notwithstanding this, this court has jurisdiction to deal with the petition.

The other point on the judgment debtor being only one of several defendants in the judgment obtained was not pursued in the submissions and I take it that it had been abandoned.

In the circumstances:

(1) I allowed the appeal (encl 28) against the dismissal by the learned SAR wherein he dismissed the application to set aside the creditor's petition with costs.

(2) I allowed the appeal (encl 38) against the dismissal by the learned SAR wherein he dismissed the appellant's application to set aside the service of the creditor's petition dated 16 March 1990 and to strike out the creditor's petition dated 13 March 1990; and I did not allow

A the appeal against the learned SAR's dismissal to set aside the service of the bankruptcy notice. Since the appeal is allowed only in part, the appellant shall have half the costs only; and

(3) I allowed the appeal (encl 39) against the granting of the receiving and adjudication orders with costs.

B *Appeal allowed.*

Reported by Kanesh Sundrum

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